IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NOS.
	:	01-204 and 01-205
v.	:	
	:	
DARRYL BROWN	:	CIVIL ACTION NO. 03-5867

MEMORANDUM AND ORDER

McLaughlin, J. January 11, 2005

Darryl Brown pled guilty on November 11, 2001, to numerous charges stemming from the defendant's operation of an identity theft ring involving the use of stolen identities for the fraudulent purchase of automobiles. Mr. Brown has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The Court will deny the petition.

The defendant raises numerous grounds in his petition. His allegations comprise three general categories of complaint: (1) technical deficiencies in the indictment and the guilty plea hearing; (2) claims of ineffective assistance of counsel with respect to two of his counsel; and (3) claims based on Blakely v. Washington, 124 U.S. 2531 (2004). Most of the ineffectiveness claims stem from the fact that the government did not file a 5K1.1 motion to allow the Court to depart downward from the sentencing guideline range because the defendant had not been truthful during his cooperation. The defendant filed a motion to

force the government to do so and the Court denied the motion, finding that the defendant had lied during his cooperation.

The Court has decided this petition without having a hearing. Rule 4(b) of the Rules Governing § 2255 Proceedings requires the summary dismissal of a § 2255 petition "[i]f it plainly appears from the fact of the motion and any annexed exhibits and prior proceedings in the case that the movant is not entitled to relief." A hearing is not necessary where the defendant's factual allegations, when reviewed against the record, fail to state a claim upon which relief may be granted. Hill v. Lockhart, 474 U.S. 52, 60 (1985). Where the record affirmatively indicates that a claim for relief is without merit, a decision not to hold a hearing is well within the trial court's discretion. Government of Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1988); United States v. Dawson, 857 F.2d 923, 927 (3d Cir. 1988). The Court is thoroughly familiar with the facts surrounding the defendant's claims. Many of these claims were brought up by the defendant during the litigation of the case.

I. Procedural History

On April 17, 2001, Darryl Brown was indicted twice. In Indictment No. 2001-204, Mr. Brown was charged with four counts of conspiracy to commit bank fraud, identity theft, and wire fraud, among other offenses, in violation of 18 U.S.C. § 371; two

counts of bank fraud, in violation of 18 U.S.C. § 1344; twenty-seven counts of interstate transportation of stolen motor vehicles, in violation of 18 U.S.C. § 2312; and four counts of fraudulent use of a Social Security account number to deceive or defraud, in violation of 42 U.S.C. § 408(a)(7)(B). In Indictment No. 2001-205, Mr. Brown was charged with five counts of bank fraud involving more than $70,000 worth of counterfeit and stolen checks, in violation of 18 U.S.C. § 1344.

Pursuant to a written plea agreement that contained specific obligations, conditions, and requirements pertaining to Mr. Brown's anticipated cooperation with the government in the investigation and possible prosecution of other persons who have committed criminal offenses, Mr. Brown entered a plea of guilty to all charges in both indictments on November 16, 2001.

On June 28, 2002, the Court held a hearing on Mr. Brown's motion for specific performance of the plea agreement. Mr. Brown alleged, among other things, that the government acted in bad faith in deciding that it would decline to file a downward departure motion pursuant to U.S.S.G. § 5K1.1. In a written decision dated July 11, 2002, I denied Mr. Brown's "bad faith" motion, determined that the government had acted in good faith, and concluded that Mr. Brown had, in fact, lied to the government during the course of his attempted cooperation and in his testimony at the June 28, 2002, hearing.

On August 29, 2002, Mr. Brown was sentenced to a term of imprisonment of 180 months, five years of supervised release, restitution in the amount of $1,155,591.09, and a special assessment of $4,200. The judgment was entered on September 3, 2002. A timely notice of appeal was filed on September 4, 2002.

On appeal, Mr. Brown asserted that the Court improperly denied him a three-point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. On November 19, 2003, the Court of Appeals rejected Mr. Brown's claims on appeal and affirmed his sentence.

On October 23, 2003, Mr. Brown filed a § 2255 petition setting forth nineteen different grounds for relief. On November 10, 2003, he re-filed his § 2255 petition using the current form approved by the Court. In his November 10, 2003, petition, Mr. Brown listed nineteen grounds for his petition. On March 24, 2004, he filed a motion of clarification correcting a typographical error in his petition. On May 12, 2004, Mr. Brown submitted a letter to the Court regarding "expansion of record." In this letter, he recites the evidence that he contends shows that Special Agent Usleber lied to the Court. On July 6, 2004, Mr. Brown filed a motion to amend, claiming that his sentence was in violation of his Sixth Amendment rights. On October 26, 2004, the Court concluded that it would decide all nineteen claims in

the November 2003 petition, as clarified and amended by the later filings described above.

II. Applicable Legal Principles

Whether or not counsel will be considered "ineffective" for habeas purposes is governed by the two-part test articulated by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the defendant must prove that (1) counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's error, the result would have been different. Id. at 687-96; see also United States v. Nino, 878 F.2d 101 (3d Cir. 1989).

In evaluating the first prong, a Court must be "highly deferential" to counsel's decision and there is a "strong presumption" that counsel's performance was reasonable. United States v. Kauffman, 109 F.3d 186 (3d Cir. 1997)(citing Strickland). Counsel must have wide latitude in making tactical decisions. Strickland, 466 U.S. at 689. The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. United States v. Gray, 878 F.2d 702 (3d Cir. 1989).

The conduct of counsel should be evaluated on the facts of the particular case, viewed as of the time of the conduct.

Strickland, 466 U.S. at 690. The Third Circuit, quoting Strickland, has cautioned that: the range of reasonable professional judgments is wide and courts must take care to avoid illegitimate second-guessing of counsel's strategic decisions from the superior vantage point of hindsight. Gray, 878 F.2d at 711.

For the second prong, the courts have defined a "reasonable probability" as one which is sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. Put another way, whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. The effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial.

III. Application of Legal Principles to the Petition

The Court will discuss each of the nineteen grounds of the petition seriatim. I will then discuss the Blakely issues.

A. Amended Ground No. 1

In his amended Ground No. 1 for relief, Mr. Brown asserts that the Court lacked jurisdiction as to the bank fraud counts to which Mr. Brown pled guilty in both indictments because the Court failed to advise Mr. Brown when he pled guilty that the

government would have had to prove that the victim financial institutions were "FDIC insured." According to Mr. Brown, no such warning was ever given and, therefore, he could not be convicted of the bank fraud counts to which he pled guilty.

A guilty plea is an admission of all the elements and material facts of the criminal charge contained in an indictment. See United States v. Broce, 488 U.S. 563, 569 (1989). The bank fraud counts are set forth in Counts 24 and 26 of the Indictment No. 01-204 and Counts 1-5 of Indictment No. 01-205. In both indictments, the government alleged that each of the victim financial institutions is federally insured. Mr. Brown, therefore, was put on notice regarding this element of the bank fraud charges. Mr. Brown acknowledged at his guilty plea hearing on November 16, 2001, that he had read both of the indictments and understood the charges against him. (Tr. Nov. 16, 2001, at pp. 11-12).

The Court specifically stated to Mr. Brown that the bank fraud charges against him in Indictment Nos. 01-204 and 01-205 alleged that he knowingly executed or attempted to execute a scheme or artifice to defraud a "federally insured financial institution." (Id.) At Mr. Brown's guilty plea hearing, the Court again summarized the charges and again reminded Mr. Brown that among the charges to which he was pleading guilty is "conspiracy to defraud federally insured banks and financial

institutions." (Id. at p. 27). The Court also explained to Mr. Brown that "[t]he Government would have to prove that you knowingly executed or attempted to execute a scheme and artifice to defraud a federally insured financial institution." (Id. at p. 29). When asked if he understood that point, Mr. Brown stated under oath: "Yes, your Honor." (Id.). There is no merit to this ground for relief.

B. Amended Ground No. 2

In his amended Ground No. 2, Mr. Brown states that he is "actually innocent" of the crimes charged in Counts 34, 35, 36 and 37 of the indictment. Each of those counts charges Mr. Brown with fraudulent use of a Social Security number ("SSN"). Specifically, each of the counts charges Mr. Brown with falsely representing that SSN 208-70-9114 had been assigned to him by the Social Security Administration when, in fact, that was not his true SSN. In his § 2255 petition, Mr. Brown states that this number is, in fact, his true SSN.

In its guilty plea memorandum filed on August 17, 2001, the government summarized the facts at to these counts, stating that Mr. Brown used a false social security number. At his guilty plea hearing on November 16, 2001, Mr. Brown stated under oath that these facts are true and correct:

> THE COURT: Have you reviewed the materials in the plea memo from page nine to 37 that set out

a series of facts that Mr. Pease has just summarized?

THE DEFENDANT: Yes, your Honor.

THE COURT: And was that section of the plea memorandum accurate?

THE DEFENDANT: Yes, your honor.

(Tr. Nov. 16, 2001, at pp. 37-38). There is no merit to this ground for relief.

C. Amended Ground No. 3

Mr. Brown alleges in amended Ground No. 3 that the charges in Indictment No. 01-205 are "defective" in that they fail to charge an essential element of the offense –- "interstate commerce." Mr. Brown is incorrect as to the law. All five counts in this indictment charge bank fraud. "Interstate commerce" is not an essential element of the offense of bank fraud.

D. Amended Ground No. 4

Mr. Brown alleges in this ground that the Court "constructively amended" the indictment by allowing him to agree to other crimes stipulations that were included in the plea agreement in this case. By considering these other crimes stipulations, Mr. Brown alleges that the Court imposed an illegal sentence.

In his guilty plea agreement with the government, Mr. Brown agreed that, in addition to the numerous crimes charged against him in both of the indictments, he committed related, additional criminal offenses which, for purposes of determining the sentence, should be considered by the Court. Mr. Brown seems to be under the impression that it was necessary for the government to return a superseding indictment specifically charging him with each of the offenses described in these other crimes stipulations for those offenses to be considered at the time of sentencing. That is incorrect. U.S. Sentencing Guidelines Section 1B1.2(c) specifically provides for these types of stipulations. Mr. Brown admitted under oath when he entered his plea that he committed the additional offenses. There is no merit to this ground for relief.

E. Ground Nos. 5, 6, 7 and 8

Ground Nos. 5, 6, 7 and 8 allege that Mr. Brown's previous counsel, Patrick Egan, was ineffective for various reasons. Ground Nos. 5, 6 and 7 relate to Mr. Brown's dissatisfaction with the fact that he did not receive a downward departure under Section 5K1.1 and that he did not receive an acceptance of responsibility adjustment at sentencing. The government's decision not to file a 5K1.1 motion and the decision of the Court not to grant a downward adjustment for acceptance of

responsibility are the result of the fact that Mr. Brown lied to the government during his cooperation as explained earlier in this memorandum. Mr. Brown challenged the denial of a 5K1.1 motion by moving to enforce the plea agreement. A hearing was held and the parties submitted evidence on the issue. The Court declined to compel the government to file a 5K1.1 motion because it determined that Mr. Brown did, in fact, lie to the government during the course of his cooperation and that such lies constituted a breach of the plea agreement with the government.

At sentencing, the Court found that Mr. Brown obstructed justice and, therefore, denied a downward adjustment for acceptance of responsibility. Mr. Brown appealed that decision to the Third Circuit and lost. The petitioner may not relitigate claims that were actually decided on direct appeal (unless substantive law has changed). United States v. Derewal, 10 F.3d 100, 105 n. 4 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994).

The Court concludes that Mr. Brown's failure to receive a 5K1.1 motion and a three level downward adjustment for acceptance of responsibility were not the result of any allegedly ineffective assistance provided by Mr. Egan. Mr. Brown's behavior after entering his plea in this case was the sole reason why he did not receive the downward departure motion. In his own pleading, Mr. Brown acknowledges that the government and the

Court advised him when he pled guilty that no determination had yet been made as to his eligibility for a 5K1.1 motion. When he pled guilty, Mr. Brown stated under oath that he understood the terms and conditions of his plea agreement and agreed to be bound by those terms. (See Tr. Nov. 16, 2001, at p. 21). The plea agreement specifically required as one of its terms and conditions that Mr. Brown "agrees to provide truthful, complete and accurate information and testimony," and "that he will not falsely implicate any person or entity and he will not protect any person or entity through false information or omission." (Brown Guilty Plea Agreement, at ¶ 5(a) and (c)).

In Ground No. 5, Mr. Brown complains that Mr. Egan told him that he had already earned his 5K1.1 downward departure motion prior to pleading guilty but that, at the time he entered his plea, the government advised the Court that no determination had been made as to Mr. Brown's eligibility for a downward departure. Thus, even if Mr. Egan had made such a statement to Mr. Brown, any such statement is completely contradicted by the terms of the guilty plea agreement and by the government during Mr. Brown's guilty plea hearing. Mr. Brown does not allege that he believed that he would receive a 5K1.1 motion even if he lied to the government, or that Mr. Egan advised him that he would still be eligible for the 5K1.1 motion even if he had lied. Mr.

Brown was well aware when he plead guilty that if he lied to the government, a 5K1.1 motion would not be filed.

In Ground Nos. 6 and 7, Mr. Brown complains that his counsel did not obtain for him as good a plea deal as he should have received. Mr. Brown does not explain how his attorney's allegedly ineffective assistance in negotiating the plea agreement that he signed caused him prejudice and how the outcome of this case would have been different. In order to withdraw his guilty plea based on counsel's ineffective assistance, Mr. Brown must do more than prove that counsel's conduct was deficient. Mr. Brown must also prove that there is a reasonable probability that, but for counsel's supposed errors, he would have pleaded not guilty and proceeded to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Scarbrough v. Johnson, 300 F.3d 302, 306 (3d Cir. 2002). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 703. In his motion, Mr. Brown fails to allege that he would not have plead guilty and instead would have proceeded to trial in the absence of counsel's alleged errors.

Mr. Brown bears the burden of production and persuasion regarding the alleged unreasonableness of counsel's conduct, as well as prejudice. Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) ("In order to establish ineffective representation, defendant must prove both incompetence and prejudice.");

Government of Virgin Islands v. Bradshaw, 726 F.2d 115, 117 (3d Cir. 1984) ("We recognize at the outset that Bradshaw bears the burden of proving his claim of ineffective assistance of counsel."). Mr. Brown has not met either burden.

With respect to Ground No. 8, Mr. Brown again attempts to blame his attorney, Patrick Egan, for not being present when he admitted to the prosecutor and case agent at a trial preparation session that he had lied about some important matters raised by Mr. Brown during the course of his cooperation. This issue was raised and addressed during the hearing on June 28, 2002. Mr. Brown and his attorney had agreed that the government could meet with Mr. Brown without counsel present during the course of his cooperation. Mr. Brown argues that he was put at a "disadvantage" by the fact that his attorney was not present on February 5, 2002, when he admitted that he had lied. Mr. Brown fails to explain how the presence of his attorney would have somehow affected the outcome of this case or changed the fact that he had previously lied to the government and breached his plea agreement. The record in this case shows that Mr. Egan made very effort to attempt to resurrect Mr. Brown's 5K1.1 motion despite Mr. Brown's lies.

On February 8, 2002, government counsel notified Mr. Egan that it had discovered that Mr. Brown had lied concerning several important matters and could not be used as a trial

witness. Mr. Egan asked for an opportunity to meet with the U.S. Attorney's Office in order to discuss the matter further and to attempt to resuscitate the 5K1.1 motion.

On March 18, 2002, however, Mr. Brown wrote a letter to this Court in which he stated that "I have never misled the government or provided false information . . .." He claimed in this letter to the Court that government counsel falsely accused him of lying and was acting in bad faith.

On April 1, 2002, at Mr. Egan's request, a meeting was held at the U.S. Attorney's Office to discuss this matter further. As a result of the meeting, the government made a proposal to Mr. Egan and to Mr. Brown. The proposal was that the government would file a downward departure motion under 5K1.1 (but make no downward recommendation) if Mr. Brown would agree to a two level obstruction enhancement as a result of his making false statements to the government during his cooperation. The proposal included a stipulation that if Mr. Brown agreed to this two level enhancement and fully acknowledged to the Court that he made the false statements, it would not ask the Court to deny the three level reduction for acceptance of responsibility, which would otherwise normally accompany an obstruction enhancement.

On April 15, 2002, Mr. Egan notified government counsel that Mr. Brown had rejected his proposal. Mr. Egan reported that Mr. Brown denied that he ever lied to the government concerning

the kickbacks to Joseph Joyce and insisted that he did, in fact, pay kickbacks to Joseph Joyce. In light of Mr. Brown's rejection of the proposal, the government notified Mr. Egan that it would not be filing a downward departure motion on his behalf at the time of sentencing.

The record before this Court demonstrates that Mr. Egan was not in any way ineffective in his representations of Mr. Brown.

F. Ground Nos. 9, 10, 11, 12 and 13

Mr. Brown asserts in Ground Nos. 9-13 that Giovanni Campbell, who replaced Patrick Egan after Mr. Egan was permitted to withdraw as counsel, was also ineffective. Ground Nos. 9-12 all relate to the issues surrounding Mr. Brown's false statements to the government and obstructive conduct, the denial of his 5K1.1 motion by the government, and the Court's denial of any acceptance of responsibility reduction.

In Ground No. 9, Mr. Brown alleges that his counsel failed to go over the 302 statements with him prior to the June 28, 2002, hearing. Mr. Campbell did receive the 302 statements before the hearing and used them in cross-examining the witnesses. Even assuming that Mr. Campbell did not "go over them" with Mr. Brown prior to the hearing, there is no basis to

think that that review of the 302 statements would have brought about a different outcome of the hearing.

Ground No. 10 alleges that Mr. Campbell failed to investigate the government's breach of the terms of the plea agreement and failed to advise the Court of the nature and extent of the Mr. Brown's cooperation. Mr. Brown also claims that the government misrepresented the extent of Mr. Brown's cooperation. Further investigation would not have changed the result here. The Court denied the motion to enforce the plea agreement not because of a failure of cooperation but because Mr. Brown lied during his cooperation sessions. In any event, the government conceded that Mr. Brown had given sufficient assistance to get a 5K1.1. The problem was that he lied about important matters.

Ground No. ll alleges that this Court "erred in taking into consideration, the Petitioner would had [sic] lied at his codefendant trial." The Court did not take into consideration any potential false trial testimony.

Ground No. 12 alleges that Mr. Campbell was ineffective because he failed to bring to the Court's attention the alleged failure by the government to disclose allegedly favorable evidence, i.e., letters from Lawrence White. These letters from inmate Lawrence White, however, were provided to his counsel on June 14, 2002. There was no failure by the government to turn

over the letters and Mr. Campbell was not ineffective for failing to bring to the Court's attention something that did not occur.

Ground No. 13 alleges that Mr. Campbell was ineffective for failing to raise as an issue on appeal an objection to the Court's calculation of the restitution amount. At the sentencing hearing, the government presented substantial evidence to the Court and to the defendant showing the exact amount of the losses suffered by the victim car dealerships and financial institutions. The government's detailed presentation of evidence with respect to the loss amount, the defendant's response, and the Court's ruling are set forth at pages 17-26 of the transcript of the sentencing hearing on August 29, 2002. All of the underlying evidence supporting the government's loss amounts was admitted into evidence at that time. It was not ineffective to forego raising an issue so lacking in merit.

G. Ground No. 14

In Ground No. 14, Mr. Brown alleges that the Court "erred by never inquiring into the Petitioner [sic] ability to pay amount of restitution, as required."

The MVRA makes restitution mandatory for certain crimes, see 18 U.S.C. § 3663A(a)(1), and requires district courts to order the payment of restitution in the full amount of the victim's losses "without consideration of the economic

circumstances of the defendant." Coates, 178 F.3d at 683 (citing 18 U.S.C. § 3664(f)(1)(A); United States v. Jacobs, 167 F.3d 792, 796 (3d Cir. 1999) (MVRA's "clear and unambiguous mandatory language" requires defendants to pay full restitution to their victims)). Mr. Brown's ability to pay restitution was not relevant to the Court's determination that Mr. Brown must pay restitution. Ground No. 14 is without merit.

H. Ground No. 15

In Ground No. 15, Mr. Brown complains that the Court erred in increasing the offense level by four levels because of Mr. Brown's role in the offense. He alleges that the evidence supporting the adjustment was obtained by the government as a result of information that he provided to the government in an "off-the-record" proffer session and therefore should not have been considered. At the sentencing hearing on August 29, 2002, in reliance upon U.S.S.G. § 3B1.4, the Pre-Sentence Investigation Report at ¶ 38, and the fact that Mr. Brown stipulated to the enhancement in his plea agreement at ¶ 13(k), the Court determined that the offense level should be increased by four levels because Mr. Brown was an organizer or leader of a criminal activity that involved five or more participants.

Even if the enhancement were based only on information that Mr. Brown provided to the government under an "off-the-

record" proffer letter, the information could still be used to form the basis of the enhancement because, as part of his plea agreement with the government, Mr. Brown agreed that "all information provided under any prior off-the-record proffer letter shall be on the record as of the date of the defendant's entry of a guilty plea." Plea Agreement, at ¶ 5(b)(ii). Mr. Brown also stipulated to the enhancement in his plea agreement with the government. Plea Agreement, at ¶ 13(k). See United States v. Cianci, 154 F.3d 106, 109-110 (3d Cir. 1998).

Application of the organizer/leader enhancement was not dependent on any statements that Mr. Brown made to the government. There was overwhelming evidence that Mr. Brown was the leader and organizer of a large and complex conspiracy involving numerous others, including car salesmen and a loan clerk at the Philadelphia Federal Credit Union, in which approximately fifty-nine individuals and dozens of car dealerships, financial institutions and insurance companies were victimized.

I. Ground No. 16

In Ground No. 16, Mr. Brown complains that the Court did not inform him that a potential consequence of his guilty plea would be the filing of civil actions against him by some of his victims. This claim is without merit. The Court has no

obligation to inform a defendant of the possibility of civil suits by the victims.

J. Ground No. 17

In Ground No. 17, Mr. Brown alleges that his counsel was ineffective for failing to pursue on appeal a claim that the Court erred when it granted the government's motion for an upward departure due to the severe non-economic harm that Mr. Brown caused to his fifty-nine individual victims as a result of his unlawful use of their identities. Nothing in Mr. Brown's petition demonstrates how the outcome would have been different if his counsel had pursued Mr. Brown's arguments on appeal. Ground No. 17 is without merit.

K. Ground No. 18

In Ground No. 18, Mr. Brown asserts that his counsel was ineffective for allegedly failing to file a motion seeking to withdraw his guilty plea. Again, this claim is dependent on the petitioner establishing that the government violated the plea agreement. The Court already found that it did not do so.

L. Ground No. 19

In Ground No. 19, Mr. Brown asserts that the Court failed to inform him about all of the elements of the offenses of

which he had been charged and to which he agreed to plead guilty. Mr. Brown points to the other crimes stipulations that were part of the plea agreement that he entered into with the government and claims that the Court was required to inform him of the elements of these offenses with which he was charged. The Court disagrees. Mr. Brown was not formally charged with any of the offenses that are referenced in the other crimes stipulations. The other crimes stipulations are additional criminal conduct that Mr. Brown engaged in as part of the scheme outlined in the indictment. The Court did go through with Mr. Brown at the time that he entered his guilty plea all of the essential elements of each of the offenses charged in the indictment and to which he was pleading guilty.

M. Blakely Claims

In his July 6, 2004, amendment to his § 2255 petition, Mr. Brown relies on Blakely v. Washington, 124 U.S. 2531 (2004), to support his claim that his sentence was unlawful. The government argues that a Blakely claim should be rejected in this case for three independent reasons: (1) Blakely does not apply retroactively to cases on collateral review; (2) any Blakely claim has been procedurally defaulted; and (3) Blakely does not apply here because the petitioner stipulated in his plea agreement and in open court to the controlling facts and

sentencing enhancements applied in this case. Because the Court concludes that Blakely does not apply retroactively to cases on collateral review, it will deny this claim.

The Court is convinced that Blakely does apply to the Federal Guidelines; but, the Court also concludes that Blakely would not be applied retroactively to a case such as Mr. Brown's that is on collateral review. The government has set forth in its opposition to Mr. Brown's petition an exhaustive discussion of the law of retroactivity. The Court agrees with the analysis presented by the government and will not repeat that analysis here. The Court will state that if Blakely were retroactive and if a Blakely claim were not procedurally defaulted, an issue that the Court does not decide here, the Court would have difficulty concluding that Mr. Brown admitted at the time of his guilty plea hearing all the operative facts that apply to the Guideline enhancements in this case. For example, Mr. Brown did not agree to the facts that resulted in the obstruction of justice enhancement or to all of the facts related to the upwards departure. The Court, out of an abundance of caution, will issue a Certificate of Appealability with respect to the Blakely claims only.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NOS.
	:	01-204 and 01-205
v.	:	
	:	
DARRYL BROWN	:	CIVIL ACTION NO. 03-5867

ORDER

AND NOW, this 11th day of January, 2005, upon consideration of petitioner's Motion to Vacate/Set Aside/Correct Sentence Under 28 U.S.C. § 2225 (Docket No. 293), the government's response thereto, and all the papers filed by the petitioner, IT IS HEREBY ORDERED that the petition is DENIED. IT IS FURTHER ORDERED that the Court will grant a Certificate of Appealability as to the claims based on Blakely v. Washington, 124 U.S. 2531 (2004).

BY THE COURT:

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MARY A. McLAUGHLIN, J.